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IN THE

Supreme Court of the United States

October Term, 1939

No. [redacted] 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

BRIEF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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I

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and

appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

No petition for rehearing was filed in the court below.

II

JURISDICTION

1. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

2. Petitioner requests this court to review this judgment by virtue of the authority contained in Judicial Code, Sec. 240, as last amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938 (Title 28, Sec. 347(a), U. S. C. A.). Respondent concedes this court has authority to review the judgment below; but respondent urges that there are no reasons pursuant to Rule 38 (Rules of the Supreme Court) or otherwise for the exercise of this court's discretionary powers and asserts that:

This court should not grant the petition prayed for, as the question involved has been settled by this court. The cases believed to sustain respondent's assertion are:

Rooker vs. Fidelity Trust Co., 263 U. S. 413;

Baldwin vs. Iowa State Traveling Men's Assoc., 283 U. S. 522, 524-526;

American Surety vs. Baldwin, 287 U. S. 156, 164-167.

III

STATEMENT OF THE CASE

In the light of the action of the petitioner in refusing to retain jurisdiction of this cause, a review of the proceedings prior to his decision is necessary.

Five plaintiffs filed separate actions against Armour & Company, hereinafter referred to as "Armour," and Charles J. Burmeister, hereinafter referred to as "Burmeister," in the Court of Common Pleas at Toledo, Ohio. In all material respects, petitions of the plaintiffs are identical. Each seeks to recover money damages for injuries claimed to have resulted from contracting a disease known as trichinosis due to the alleged presence of trichinae in *fresh pork* sold by Armour to Burmeister, and thereafter manufactured by Burmeister into a smoked product known as mettwurst sausage, which was "a food product, ready for human consumption without cooking or further treatment." (R. 11.)

The case of George Kniess, who was one of the five plaintiffs, was tried as a test case, and the other four remained pending. The Supreme Court of Ohio, on November 30, 1938, rendered its decision in the case, *George Kniess vs. Armour*, 134 O. S. 432, 17 N. E. (2d) 734, 119 A. L. R. 1348. The Supreme Court of Ohio reversed the judgment against both defendants on the grounds that:

1. The defendants were not jointly liable under the laws of Ohio.

2. Separate causes of action against different defendants may only be joined where the liability is joint; and joinder of such distinct causes of action is improper

in the instant case under the Ohio statutes and does not defeat the right of a non-resident defendant to remove to the federal court the separate suit against such defendant.

3. Armour was entitled to remove the cause of action against it to the United States District Court.

4. The judgment against Burmeister was reversed because he was not jointly liable under the laws of Ohio.

The mandate (R. 19) being returned to the Court of Common Pleas, the petition for removal to the District Court of the United States in each of said five cases was granted by the Court of Common Pleas, and said causes were removed to and duly docketed in the United States District Court.

Instead of filing a petition for a writ of *certiorari* to this court, as provided by law, Title 28, Sec. 344(b), U. S. C. A., the plaintiff, George Kniess, on March 3, 1939, filed a motion to remand, as likewise did the plaintiffs in the other four cases. In the *George Kniess case,* there was filed an affidavit in support of the motion to remand in which Kniess claimed to be an alien and a subject of Germany, and to conform to the alleged facts, Armour filed a motion in the District Court to amend its petition for removal, so as to show that Kniess was a citizen and a subject of Germany, if such was the fact, such amendment being authorized by Title 28, U. S. C. A., Sec. 399. The petitioner in this cause never made any ruling on the motion to amend. Petitioner entered an order remanding the *Kniess case* and the four companion cases, in which it is not claimed the plaintiffs are aliens, but no opinion was filed in sustaining the motion to remand. Thereupon Armour filed in each of said cases a motion

to vacate and set aside the order to remand (R. 36), but said motions were overruled without opinion (R. 7).

Thereupon Armour brought an original action by filing a petition for a writ of mandamus in the United States Circuit Court of Appeals for the Sixth Circuit (R. 2-7), leave having first been obtained (R. 1), requesting the United States Circuit Court of Appeals to issue the writ on the ground that petitioner failed to give full faith and credit to the decisions and orders of the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio, as required to do by law (Title 28, Sec. 687, U. S. C. A.); that the petitioner transcended his power in remanding these cases, as there was not and could not be any matter presented to him for determination that had not previously been passed upon and finally disposed of by the Supreme Court of Ohio and the Court of Common Pleas of Lucas County, Ohio; that the decision of the Supreme Court of Ohio to the effect that the separate suit against Armour was removable was then *res adjudicata;* and the power to review the decision of the Supreme Court of Ohio is vested solely in the Supreme Court of the United States (Judicial Code, C. 229, Sec. 1); 43 Stat. 937, as last amended February 13, 1925 (Title 28, U. S. C. A. 344(b)) and cannot be exercised by the petitioner herein. (R. 7-10.)

Armour's contention in the above respects for the Circuit Court of Appeals are set forth in a memorandum in support of its motion for leave to file the petition, which appears in the record at pages 40 to 60. These contentions were adopted by the United States Circuit Court of Appeals in its opinion which is reported in 109 Fed. (2d) 72, and which appears in the record, pages 66, *et seq.*

IV

ARGUMENT AND LAW

A. The Writ of Mandamus Is the Only Available Remedy to Correct the Refusal of the District Court to Give Full Faith and Credit to the Judgments of the Ohio Courts.

The respondent concedes that an order of remand by a District Court is not reviewable by appeal or writ of error and likewise concedes that the usual order of remand following an original determination of the question by the District Court is not reviewable by way of a write of mandamus.(1)

It is the contention of Armour in the instant case that the action of the District Court went beyond the usual order of remand, in that the District Court purported to make a determination of a matter that had already been submitted to and passed upon by the state courts, and that the order of the District Court in effect refused to give full faith and credit to the decisions and orders of the state courts. 28 U, S. C. A., Sec. 687, provides in part that:

> "* * * The records and judicial proceedings of the courts of any State * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage from the courts of the State in which they are taken."

It is well settled that a judgment in the courts of a state is conclusive in the federal courts between the

(1) *Employers Reinsurance Corporation vs. Bryant*, 299 U. S. 374, 378-381.

parties whether the question determined was one of federal, general or local law, even though the state courts may have decided a jurisdictional question erroneously.(2)

The plaintiffs in the State Court had a right to litigate either in the State Court *or* in the District Court the question as to whether or not Armour and Burmeister were properly joined. The plaintiffs, had they desired to do so, could have permitted the Common Pleas Court to issue an *ex parte* order of removal. On the other hand, they could, and *in this instance did,* request and receive a hearing on that question in the Court of Common Pleas and in the Court of Appeals of Lucas County, Ohio and in the Supreme Court of Ohio.

It is the contention of Armour that an adequate state remedy was available to the plaintiffs in the State Court, and having invoked that and pursued it to final judgment, they cannot escape the effect of that adjudication.(3)

It was the duty of the Supreme Court of Ohio to decide the questions presented to it. That decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, nor subject to revision by the District Court of the United States. It merely left it open to reversal or modification in this court, providing an appropriate and timely proceeding was instituted. Until reversed or modified by this court, the decision of the Supreme Court of Ohio constituted an effective and conclusive adjudication. No court of the United States except the Supreme

(2) *Baldwin vs. Iowa State Traveling Men's Association,* 283 U. S. 522, 524-526;
American Surety Co. vs. Baldwin, 287 U. S. 156, 164-167.

(3) *American Surety Co. vs. Baldwin, supra;* (1)
Baldwin vs. Iowa State Traveling Men's Association, supra. (1)

Court can modify that judgment. This court will compel all courts of the United States to give full faith and credit to that judgment until it reverses or modifies it in the manner authorized by law.[4]

It would be extremely rare for a District Court of the United States to disregard a decision of the State Court upon a question on which the state law is admittedly conclusive. Not only is this required by law, but it is indispensable for the preservation of the proper relations between federal and state courts. The orderly administration of justice requires that courts of the United States having no appellate functions over state courts should not be resorted to in order to nullify or supersede by their decrees a decision of the highest court of the state between the same parties. It was the right and duty of the Circuit Court of Appeals to give great weight to the decision of the Supreme Court of Ohio and to respect it and give effect to it as a decision which estopped the parties from renewing the same contentions before the United States District Court of Ohio. The highest degree of courtesy, good faith and respect should mark the relations between courts of different jurisdictions, and since the petitioner herein failed and refused to give effect to the judgment of the Supreme Court of Ohio, it was the duty of the United States Circuit Court of Appeals to compel him to do so.[5]

The mere form of the application made to the District Court does not determine the issue decided. The question before this court is not whether mandamus is proper to review an order made in response to a petition

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(4) *Rooker vs. Fidelity Trust Co.*, 263 U. S. 413.

(5) *City of Boston vs. McGovern*, 292 Fed. 705, 707-710-714-718. *Certiorari* denied, 265 U. S. 581.

designated as a motion to remand, but whether a District Court of the United States has power to review a decision of the Supreme Court of Ohio and in the attempted exercise of that power divest itself of jurisdiction of a controversy committed to it under the laws of the United States. Mandamus is the appropriate remedy where the District Court asserts a power it does not have.[6]

If the petitioner's contentions are correct, the Court of Common Pleas of Lucas County, Ohio, is faced with a mandate of the Supreme Court of Ohio ordering the causes in question removed, and with a conflicting mandate from the District Court purporting to make a second determination and a contradictory order on the same question. This situation certainly does not accomplish the objects of the removal statutes "to suppress further prolongation of the controversy."[7] Surely it was never intended that a question should be litigated through the courts of Ohio and finally determined by the Supreme Court of Ohio and that the identical question could then be considered *de novo* by the District Court and decided by the District Court contrary to the decision of the Supreme Court of Ohio, particularly when it is admitted that the question involved is determined exclusively by the law of Ohio, as construed by the courts of Ohio.

Counsel for petitioner agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, but claim that the Federal Court in remanding "does not decide that it was improperly removed, but merely that it has appeared at a later stage of the proceedings that there is in fact no basis for fed-

(6) *Metropolitan Trust Co.*, 218 U. S. 312;
Windholz vs. Everitt, 74 Fed. (2d) 834.

(7) *Employers Reinsurance Company vs. Bryant, supra* (1)

eral jurisdiction." The petitioner's position is stated on page 24 of his brief as follows:

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata on the question of removability, because that question can only be solved* on a determination of the substantive law of the State of Ohio with respect to joint liability. But the Circuit Court of Appeals overlooked the fact that a federal district judge in remanding a case under the above statute does not decide that it was improperly removed, but merely *that it appeared at a later stage of the proceedings that there is in fact no basis for federal jurisdiction.* Removability is determined from the petition and the petition for removal. But the right and duty to remand under the above statute contemplates a consideration of any and all facts which may later appear and which may show that in fact there is no basis for federal jurisdiction. * * *." (Italics ours.)

In support of the foregoing statement, the petitioner cites two cases that are in no wise in point. On the contrary it is well settled that the federal court does not lose jurisdiction once it has attached, even though the plaintiff may amend to reduce his claim below the jurisdictional amount;[8] the plaintiff dismisses the case after the defendant has filed a counterclaim below the jurisdictional amount;[9] the residence of the parties is changed or a substitution is made so that the requisite diversity of citizenship no longer exists;[10] the plaintiff files an

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(8) *Kanouse vs. Martin*, 15 How. 198; *St. Paul Indemnity Co. vs. Cab Co.* 303 U. S. 283.

(9) *Kirby vs. American Soda Fountain Co.*, 194 U. S. 141, 146.

(10) *Morgan's Heirs vs. Morgan*, 2 Wheat. 290, 297;
Mollan vs. Torrance, 9 Wheat. 537;
Dunn vs. Clarke, 8 Pet. 1;
Clarke vs. Mathewson, 12 Pet. 164;
Phelps vs. Oaks, 117 U. S. 236;
Hardenberg vs. Ray, 151 U. S. 112;
Wichita R. & Light Co. vs. Public Utilities Comm'n, 260 U. S. 48.

amended pleading which would not have warranted a removal originally;[11] or even if it appears from the original petition that the defendant has a valid defense on the merits if asserted.[12]

Obviously the result of the case does not affect or determine the jurisdiction of the federal court. If it did, the court could never enter a judgment for the plaintiff for less than $3,000 and could never enter a judgment for the defendant, but would always be required to remand the cause to the state courts.

The petitioner makes the further point that as to one of the five cases involved, it appeared after an amended complaint, stipulation and answer had been filed in the federal court, that the plaintiff was not in fact a citizen of Ohio, but was an alien. As previously stated, Armour promptly filed a motion pursuant to 28 U. S. C. A. 399 to amend the petition for removal to show, if it was a fact, that the plaintiff was an alien. The District Court made no ruling on this motion and by disposing of all five cases in the same fashion apparently took the position the alienage of the one plaintiff was not material to the disposition of the case.

We agree that a cause cannot be removed on the ground of separable controversy when the plaintiff is an alien. However, it is well settled that where the plaintiff has joined in the same petition a separate suit against one defendant with a separate and distinct suit against another defendant, either separate suit may be removed

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(11) *Pullman Co. vs. Jenkins*, 305 U. S. 534, 537.

(12) *Interstate B. & L. Ass'n vs. Edgefield Hotel Co.*, 109 Fed. 692;
Armstrong vs. Walters, 219 Fed. 320;
Mullins Lumber Co. vs. Williamson & Brown Land Co., 246 Fed. 232.

on the grounds of diversity, whether the plaintiff is an alien or a citizen.[13]

The distinction between a separable controversy and a separate suit had no significance until one of the plaintiffs claimed to be an alien. However, the Supreme Court of Ohio held in the *Kniess case* that two separate suits had been improperly combined in the petition and in fact reversed as to the defendant Burmeister, solely on the ground that his demurrer for misjoinder of parties should have been sustained. The holding by the Supreme Court of Ohio in the *Kniess case* is discussed somewhat further in *Losito vs. Kruse, Jr.*, 136 O. S. 183 (decided January 3, 1940). After citing the *Kniess case* and several others, the court said at page 187:

> "* * * In such case *there can be no joinder in a single action* of the party primarily liable and the party secondarily liable because there is no joint liability. If they are joined in an action and this relationship appears on the face of the petition it is demurrable for misjoinder of parties defendant. If it does not appear on the face of the petition but develops from the evidence on the trial, the plaintiff may, on motion, be required to elect as to which one of the two he will pursue, dismissing the other from the action, but not necessarily from the claim. *Canton Provision Co. vs. Gauder, supra; Bello vs. City of Cleveland, supra;*

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(13) *Lucania, etc. vs. U. S. Corporation*, 15 Fed. (2d) 568;
Stewart et al. vs. Nebraska Tire & Rubber Co., 39 Fed. (2d) 309;
Tillman vs. Russo Asiatic Bank, 51 Fed. (2d) 1023;
Hammer et al. vs. British Type Investors. Inc., 15 Fed. Supp. 497;
Rogge vs. Michael Del Balso, Inc., 15 Fed. Supp. 499;
Young vs. Southern Pacific Co., 15 Fed. (2d) 280.
The foregoing cases hold that a right of removal exists as to a "separate suit" even though it is permissible under the state practice to join it in the same petition with a "non-removable suit."
It necessarily follows that the right to remove exists in the five cases against Armour where the joinder in the same petition of the claims against Burmeister is not under the Ohio law permitted.

Morris vs. Woodburn, supra; Village of Mineral City vs. Gilbow, supra; French, Admr., vs. Central Construction Co., 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N.S.) 669; *City of Rochester vs. Campbell,* 123 N. Y. 405, 25 N. E. 937; *City of Chicago vs. Robbins,* 67 U. S. (2 Black) 418, 17 L. Ed. 298."

In other words, had the cases remained in the state courts, the plaintiffs would be required to file a separate petition against Armour and a separate petition against Burmeister[14] under the provisions of Ohio General Code 11312, which provides:

> "Procedure if causes are misjoined. When a demurrer is sustained on the ground of misjoinder of several causes of action, on motion of the plaintiff the court may allow him, with or without costs, to file several petitions, each including such of the causes of action as might have been joined; and an action shall be docketed for each of the petitions, and be proceeded in without further service."

The petitioner also suggests that the petitions for removal did not in terms state that "a separable controversy" existed. The existence of a separable controversy or of a separate suit which entitled Armour to remove was dependent entirely upon the allegations of the plaintiff's petition, and it is well settled that the petition for removal should only include statements of fact not already appearing on the record.[15] Furthermore, the petitioner in another part of his brief (page 24) states:

> "* * * We agree that the decision of the Supreme Court of Ohio was *res judicata* on the question of removability, because that question can

(14) Compare *McGowan vs. Rishel,* 125 O. S. 77, 80.

(15) *Chesapeake & Ohio Railroad vs. Cockrell,* 232 U. S. 146.

only be solved on a determination of the substantive law of the State of Ohio with respect to joint liability."

The petitioner agrees that this question has been finally disposed of by the Supreme Court of Ohio. It is also true that it was decided correctly. The petitioner's claim that he possesses power to review and reverse the decision of the Supreme Court of Ohio finds no support in the statutes or authorities.

CONCLUSION

We respectfully submit that the action of the court below was in all respects proper and that no substantial purpose can be served except a further "prolongation of the controversy" by granting a writ of *certiorari* in this case.

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